89-208

No.

Supreme Court, U.S.
FILED
JUL 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PEPSI-COLA METROPOLITAN BOTTLING CO., INC., d/b/a/ PEPSI-COLA BOTTLING GROUP,

Cross-Petitioner,

v.

ANDREW W. HANSARD,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a trial court's admission of lay opinion testimony as to the ultimate issue in an employment discrimination case constitutes serious prejudicial error requiring a new trial when the declarant of the opinion has no foundation for the opinion.

LIST OF PARTIES

The parties to the proceedings below are: (1) Andrew W. Hansard, an individual, and (2) Pepsi-Cola Metropolitan Bottling Co., Inc., a wholly owned subsidiary of the Pepsi-Cola Company, Inc., which in turn is a wholly owned subsidiary of PepsiCo, Inc.

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OCTOBER TERM, 1988

ANDREW W. HANSARD,

Petitioner,

v.

PEPSI-COLA METROPOLITAN BOTTLING CO., INC., d/b/a/ PEPSI-COLA BOTTLING GROUP,

Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 865 F.2d 1461 and is reprinted in the appendix hereto at page A-1, *infra.*

The judgment, orders and opinions of the District Court are unreported, and are reproduced as appendices B-E.

JURISDICTION

Petitioner/Cross-Respondent, Andrew Hansard, brought this suit under the Age Discrimination Employment Act, 29 U.S.C § 626 *et. seq.*, in the United States District Court for the Eastern District of Texas, invoking the court's jurisdiction under 28 U.S.C. § 1331. On December 18, 1986 the court entered judgment against Respondent/Cross-Petitioner, Pepsi-Cola Metropolitan Bottling Co. ("Pepsi-

Cola"), upon a jury verdict that Pepsi-Cola had discriminated against Hansard due to his age, and on December 23, 1986 entered an amended Judgment. On August 20, 1987, the court denied Pepsi-Cola's Motions for Judgment N.O.V. or in the Alternative a New Trial.

Pepsi-Cola appealed and Hansard cross-appealed from the judgment to the Fifth Circuit Court of Appeals, invoking jurisdiction under 28 U.S.C. § 1291. The Fifth Circuit, in an opinion dated February 21, 1989, affirmed in part, reversed in part, and remanded the case to the District Court for recalculation of damages.

On May 18, 1989, this Court granted Petitioner Hansard's Motion for Extension of Time in which to file a Petition for Certiorari. On June 21, 1989, Petitioner filed his Petition for Certiorari with this Court, and Respondent/Cross-Petitioner received said petition on June 26, 1989.

Cross-Petitioner, relying upon the time limits provided in this Court's Rule 19.5, files this Cross-Petition for Certiorari invoking the jurisdiction of this Court to review the opinion and order of the Fifth Circuit under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Rule 701 of the Federal Rules of Evidence,

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony on the determination of a fact in issue.

STATEMENT OF THE CASE

Hansard sued Pepsi-Cola under the Age Discrimination in Employment Act, 29 U.S.C. § 626, claiming that the termination of his employment and later refusal to rehire him were unlawfully motivated by his age. During the course of the trial, Hansard presented the testimony of

Charles Miller, an ex-employee of Pepsi-Cola. Mr. Miller was allowed, over Pepsi-Cola's objections, to testify to his opinions that Hansard was fired and refused rehiring because of his age and as part of a corporate "youth movement".

These inflammatory opinions upon the ultimate issues in the case were allowed even though Mr. Miller was shown to have no foundation whatsoever for the opinions. Specifically, Mr. Miller admitted that he had no knowledge of the circumstances of Hansard's termination and had never even heard any Pepsi-Cola Managers discuss the circumstances of Hansard's termination (pp. F-2, 3, *infra*).[1] Likewise Miller admitted that he did not even know who at Pepsi-Cola made the decision not to rehire Hansard, or upon what factors that decision was based (pp. F-7, *infra*). Indeed, when Mr. Miller was asked to state the basis for his opinions he responded "Just my own thoughts" (pp. F-3-4, 8, *infra*). Miller further admitted that his opinion that the company was engaged in a "youth movement" at the time of Hansard's termination was based solely upon the fact that Pepsi-Cola maintained a college recruiting program (p. F-4, *infra*).

After a jury verdict in Hansard's favor, the district court denied Pepsi-Cola's Motion for Judgment N.O.V. or for a New Trial. In denying the motion for new trial, the district court stated no reasons.

Pepsi-Cola appealed the district court's judgment to the Fifth Circuit, asserting, *inter alia*, that the erroneous admission of Mr. Miller's testimony required vacation of the judgment and a new trial. Upon review, the Fifth Circuit concluded that no error had been committed in admitting Mr. Miller's opinions, noting that it did so only "with some hesitancy." 865 F.2d at 1467. The Appellate Court expressly acknowledged that Miller had no firsthand knowl-

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[1] The text of Mr. Miller's testimony in these regards is reproduced as Appendix F.

edge of the events about which he opined, and that his opinion was "not strongly supported." Nevertheless, the Fifth Circuit found that Miller's general "experience" with Pepsi-Cola provided a sufficient foundation for his opinion despite his lack of knowledge concerning the circumstances of Hansard's termination and lack of rehire. *Id.*[2]

The Fifth Circuit noted that the evidence in the case favored "neither side overwhelmingly" and that Hansard's case rested upon an "accumulation of circumstantial evidence." 865 F.2d at 1465, 1466. Moreover, the court referred to Miller's opinion as "a major support for the verdict." 865 F.2d at 1465, 1466. Thus, there can be no doubt that if Miller's testimony was admitted erroneously, the error was prejudicial.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW IN ORDER TO RESOLVE THE CONFLICT BETWEEN THE FIFTH CIRCUIT'S DECISION AND THOSE OF OTHER CIRCUITS

The Fifth Circuit's decision should be reviewed and reversed as it creates a wholesale and dangerous expansion of the permissible uses of lay opinion testimony in employment discrimination cases. Under the decision, any current or former employee of the defendant, no mater how remote from the particular incidents involved in the case, would be qualified to offer an opinion on the ultimate issue of discrimination simply because he had some employment experience with the defendant. The Fifth Circuit's decision to thus abandon Rule 701's requirement that lay opinion must be

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[2]The Appellate Court acknowledged that the decisive factor in its decision was deference to the trial court. However, such deference was most inappropriate here, as the trial court abdicated its discretion to the jury. In overruling Pepsi-Cola's foundation objection to the testimony the trial judge turned to the jury and said "If he's [Miller] got sufficient information to base an opinion on, that is for you [the jury] to decide." (p. F-8, *infra*).

"rationally based upon the perception of the witness" is in direct conflict with the decision of the Sixth Circuit in *Mitroff v. Xomox Corp.*, 797 F.2d 271 (6th Cir. 1986). Moreover, the decision is in indirect, yet real and fundamental, conflict with the entire body of federal precedent disfavoring the use of lay opinion testimony upon the ultimate issue in discrimination cases. Accordingly, this Court should grant review in order to resolve these conflicts and to give proper guidance to the district courts upon an important and frequently recurring issue.

A. The Fifth Circuit's Decision Is In Direct Conflict With The Sixth Circuit's Mitroff Decision

The Fifth Circuit, in direct conflict with the decision of the Sixth Circuit in *Mitroff v. Xomox Corp.*, 797 F.2d 271 (6th Cir. 1986), held that a lay witness' opinion on the ultimate issue of discrimination was admissible despite the witness' established lack of a foundation. The court below explicitly recognized that Mr. Miller "had no firsthand knowledge of the circumstances leading to Hansard's termination," 865 F.2d at 1465, yet it nonetheless held admissible his opinion that Hansard was terminated due to his age. Likewise, the Fifth Circuit held there was no error in allowing Mr. Miller to offer his opinion that Hansard was denied rehire because "they thought he was too old," even though Miller admitted that he did not even know who decided that Hansard would not be rehired, much less why the decision was made.[3]

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[3]The Fifth Circuit's suggestion that the missing foundation was supplied by Miller's supposed familiarity with a corporate "youth movement," 865 F.2d at 1465, is entirely without merit. Miller admitted that his belief in a corporate "youth movement" was based exclusively upon the fact that the company maintained a college recruiting program. The Appellate Court in its opinion explicitly noted that the mere existence of a college recruiting program cannot give rise to an inference of age discrimination, 865 F.2d at 1466 n.1, and that holding is consistent with uniform prior decisions of the Fifth and other

(footnote continued on next page)

The Fifth Circuit's erroneous decision here is in direct conflict with the decision of the Sixth Circuit Court of Appeals in *Mitroff v. Xomox Corp., supra.* In *Mitroff*, an action under the ADEA, the Sixth Circuit held that admission of testimony to the effect that the defendant company's assistant personnel manager believed that there was a "pattern of age discrimination" at the company constituted serious prejudicial error requiring a new trial.[4] The Court specifically noted that no proper foundation was laid for the opinion because there was no showing that the person who gave the opinion had any basis in his own observations for the opinion beyond the mere fact that he was an assistant personnel manager for the defendant company. 797 F.2d at 276. The Court held that under such circumstances, neither requirement of Rule 701—that the opinion be rationally based on the perception of the witness and that the opinion be helpful to the fact finder—could be met. *Id.*

Mitroff's holding is in plain and irreconcilable conflict with the decision of the Fifth Circuit here. Whereas, the Fifth Circuit relied upon Mr. Miller's general "experience in the corporation" to supply a foundation, 865 F.2d at 1467, in *Mitroff*, the Sixth Circuit held that such a nebulous showing could not be an adequate foundation. The Sixth Circuit held

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(footnote continued from preceding page)

Circuit Courts of Appeal, *see, e.g., Williams v. General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *LaMontagne v. American Convenience Products*, 750 F.2d 1405, 1413 (7th Cir. 1984); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 n.4 (6th Cir. 1975). Plainly if the existence of a college recruiting program gives rise to no inference of an age bias, such a program cannot here provide a foundation for Miller's opinion that Pepsi-Cola was engaged in a youth movement.

[4] In *Mitroff*, evidence of the assistant personnel manager's opinion was given by two witnesses who testified that they heard him so opine on two occasions. The Court ruled as an alternative to its holding under Rule 701 that the testimony was also inadmissible as hearsay.

that the mere fact that the opinion-giver was an assistant personnel manager of the defendant was an insufficient basis upon which to infer an adequate foundation. If anything, Miller's "experience" provides even less of a foundation than that rejected by the Sixth Circuit in *Mitroff*. In *Mitroff*, the person who uttered the opinion was an assistant personnel manager and thus by virtue of his position could be presumed to have at least some knowledge of the defendant company's overall personnel decisions to support his opinion. By contrast, Mr. Miller was a first line supervisor at one of Pepsi-Cola's warehouse facilities with only limited hiring and firing authority over the approximately 15 employees under his supervision. Thus, the Fifth Circuit's decision directly conflicts with *Mitroff* because it allows lay opinion testimony on the ultimate question of discrimination to be based solely upon general corporate "experience" without requiring that the declarant possess first-hand knowledge upon which such an opinion could be rationally based.

The Fifth Circuit's decision is in further direct conflict with judicial interpretation of Rule 701. Rule 701 explicitly requires that lay opinion testimony can be admitted only when it is "rationally based on the perceptions of the witness." Courts interpreting Rule 701 have uniformly held that the minimum foundation necessary for admission of lay witness opinions is that the witness have first-hand knowledge of the events about which he opines. *See, e.g., United States v. Hoffner*, 777 F.2d 1423, 1426 (10th Cir. 1985) [lay witness opinions concerning whether certain prescriptions were for a legitimate medical purpose not admissible when witness did not observe the medical examinations leading to the prescriptions or the issuance of the prescriptions]; *John Hancock Mut. Life Ins. Co. v. Dutton*, 585 F.2d 1289 (5th Cir. 1978) [lay witness opinion concerning the state of mind of one participant in an altercation admissible where the witness knew the participant well and observed the entire

altercation first hand].[5] No court has ever totally dispensed with the "perception" requirement of Rule 701 as the Fifth Circuit did here.

Beyond its direct conflict with *Mitroff* and Rule 701, the Fifth Circuit's decision is in indirect conflict with numerous federal decisions disfavoring the use of lay opinion testimony in employment discrimination cases. Indeed, virtually every court of appeal to consider the issue has found that statements of lay opinion to the effect that the plaintiff and others in the company were discriminated against should be excluded from trial. *See, e.g., Haskell v. Kaman Corp.*, 743 F.2d 113, 121-22 (2d Cir. 1984) [testimony by five ex-employees of the defendant corporation to the effect that they and others were terminated because of their age held to be prejudicial error requiring a new trial; relying on Rules 402 and 403 of the Federal Rules of Evidence]; *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152, 155-57 (6th Cir. 1988) [same as *Haskell*]; *Pollard v. Rea Magnet Co.*, 674 F.Supp. 645, 654 (N.D. Ind. 1986), *rev'd on other grounds*, 824 F.2d 557 (7th Cir.), *cert. denied*, 108 S. Ct. 488 (1987)

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[5] The other cases cited by the Fifth Circuit in support of its decision likewise make clear that first-hand perception of the events is required to support lay witness opinion testimony. In *Torres v. County of Oakland*, 758 F.2d 147, 149-50 (6th Cir. 1985) the witness who offered an opinion about the reasons for which the plaintiff was not promoted had fully participated in the decision not to promote the plaintiff. Likewise, in *Bohannon v. Pegelow*, 652 F.2d 729, 737 (7th Cir. 1981), a witness was allowed to testify to her opinion that an arrest was racially motivated but only because she had witnessed the arrest from start to finish. In *Samples v. City of Atlanta*, 846 F.2d 1328, 1333-34 (11th Cir. 1988), the Court held admissible opinion testimony concerning police department practices concerning use of excessive force from a 19 year veteran of the police force who was for at least part of that time an investigator for the Department's Office of Professional Standard. The Court in *Samples* specifically noted that the witness' opinions were strongly based on his own perceptions of department practices.

[testimony by state human rights agency investigator that plaintiff's supervisor was racially biased inadmissible when based on witness' gut feeling]; *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 393-94 (E.D. Pa.), *aff'd without op.*, 639 F.2d 774 (3d Cir. 1980) [testimony by co-employees of plaintiff that they had been laid off due to their age was not admissible in an ADEA action; relying on Rule 403].

Additionally, numerous circuits have held that lay opinion testimony by other employees of the defendant to the effect that the plaintiff was discriminated against are wholly devoid of probative value when the witness was not intimately involved in the employment decision at issue in the litigation. Thus, in *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987), the court affirmed summary judgment to an employer in an ADEA case where there was evidence that the defendant's vice-president was of the opinion that "plaintiff had grounds for a lawsuit because [the employer] was going to weed out the old ones." The court held that where the vice-president had no direct involvement in the decision to fire the plaintiff, his opinion was "too attenuated" to have any probative value. Likewise, in *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251, 253 (1st Cir. 1986), the First Circuit held that evidence that one of the defendant's managers believed that the plaintiff was fired due to his age could not create an inference of age discrimination when the manager expressing the opinion had no first-hand knowledge of the circumstances of the plaintiff's firing.

Thus, virtually uniform federal precedent, with the exception of the Fifth Circuit's opinion here, recognizes that an uninformed co-employee's "opinion" that a plaintiff was discriminated against has no place in litigation of employment discrimination claims. The common sense logic and firm grounding of such a principle in the Federal Rules of Evidence cannot be disputed. The Fifth Circuit's entirely aberrant decision creates an irreconcilable conflict with both the specific decisions of other federal courts and the entire

body of federal precedent in this area. Accordingly, this Court should grant review to resolve that conflict.

B. The Fifth Circuit's Decision, If Uncorrected, Poses A Serious Threat To Fair Trials Under The Age Discrimination In Employment Act

The Fifth Circuit's decision, if allowed to stand uncorrected, constitutes an invitation to disaster in the litigation of federal employment discrimination claims. By holding that the foundation requirements of Rule 701 can be met by general experience with a defendant company, rather than by a showing of direct involvement in the employment decision at issue, the Fifth Circuit opens the door to wide scale admission of inflammatory and unfounded opinion testimony. Indeed, under the Fifth Circuit's holding, all employees and ex-employees of a company accused of employment discrimination would now be qualified, merely by virtue of the fact of their employment, to offer an opinion about whether the defendant company discriminates. Yet, such remote opinions have been held by all other federal courts to be so utterly lacking in probative value and so unfairly prejudicial that their receipt into evidence requires a new trial. In short, the Fifth Circuit's opinion encourages the admission of and reliance upon testimony that is inherently worthless and unfairly prejudicial in the trial of employment discrimination claims.

It is easy to see the disastrous practical effects of the Fifth Circuit's decision to open a breach in the heretofore seamless barrier that the federal courts had erected to this type of testimony. Virtually every employment discrimination plaintiff would be able to find some disgruntled former co-employee willing to offer an opinion that the defendant "discriminates." If, as the Fifth Circuit has now held, the fact that the witness has "experience with the corporation" is enough foundation to admit the opinion into evidence, then all of these opinions can be admitted, regardless of how remote their authors are from the particular circumstances of the case. Plainly, many a jury confronted with the con-

ceptually difficult and elusive task of determining whether prohibited discrimination has occurred, would find in such opinion a sympathetic lure upon which to base their verdict. Moreover, since the Fifth Circuit suggested that Miller's opinion was a "strong support" for the jury's verdict, a district court would be powerless to correct by judgment n.o.v. or new trial any instances in which it believed the jury to have been unduly swayed by such opinions.

The Fifth Circuit's opinion is thus a serious and ever present threat to fair jury trials of employment discrimination claims. Given the ease with which plaintiffs can offer testimony such as Mr. Miller's at trial, the issues raised by the opinion are likely to arise in the lower courts with great frequency. If uncorrected, the Fifth Circuit's opinion thus stands as a false beacon suggesting to lower courts that they sail into waters foreclosed by other federal precedent.

CONCLUSION

For the reasons stated above, this Cross-Petition for *Certiorari* should be granted. If Cross-Petitioners are correct in urging that the Courts below erred in applying the Rules of Evidence to this case, this case should be remanded to the District Court for a new trial.

Respectfully submitted,

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APPENDIX A

Andrew W. HANSARD,
Plaintiff-Appellee,
Cross-Appellant,

V.

PEPSI-COLA METROPOLITAN BOTTLING CO., INC., d/b/a Pepsi-Cola Bottling Group, Defendant-Appellant, Cross-Appellee.

No. 87-1717.

United States Court of Appeals,
Fifth Circuit.

Feb. 21, 1989.

Appeal from the United States District Court for the Northern District of Texas.

Before GEE, SNEED* and WILLIAMS, Circuit Judges.

SNEED, Circuit Judge:

Pepsi-Cola Bottling Co., Inc. (Pepsi) was held liable for violating the Age Discrimination in Employment Act (ADEA) by discharging and later refusing to rehire Andrew Hansard. Pepsi appeals the jury's verdict on liability and damages. We affirm the district court's judgment on the merits, but we reverse and remand the award of damages. Hansard cross-appeals the district court's refusal to award liquidated damages and prejudgment interest. We affirm the district court's refusal to award liquidated damages, but reverse its refusal to award prejudgment interest. The jurisdiction of the district court rested on 29 U.S.C. §626 (1982) and 28 U.S.C. §1331 (1982). This court has jurisdiction under 28 U.S.C. §1291.

I.
FACTS AND PROCEEDINGS BELOW

Hansard was employed by Uncle Joe's Bottling Co. from 1974 in Fort Worth, Texas. II Tr. 4, 12. In 1979, Pepsi acquired Uncle Joe's Bottling Co. and Hansard became a

Pepsi employee. II Tr. 4, 15, 68-69. For most of his tenure, Hansard worked on a delivery route servicing vending machines. II Tr. 14. In early 1983, the number of stops on Hansard's route decreased, but instead of reducing his hours, Pepsi permitted Hansard to work in the warehouse after his delivery route was finished. II Tr. 22-25, 68-69.

In 1983, Pepsi reorganized its corporate structure, and responsibility for Hansard's job was transferred to a different department. II Tr. 126-27. On June 20, 1983, Hansard met with three members of Pepsi's management: Scott Barth, the regional sales manager; Ms. Michael Miller, the employee relations manager; and Mark Esselman, an employee relations trainee. II Tr. 30-31. Hansard was the only employee invited to such a meeting. II Tr. 166. Hansard testified that Ms. Miller said that Hansard's department was being reorganized and that Hansard would be delivering vending machines and syrup instead of stocking vending machines. Ms. Miller asked Hansard: "Do you think you can handle it [the job]?" II Tr. 32. Earlier Ms. Miller, in a discussion with Barth and Esselman, had questioned Hansard's ability to do the new job. II Tr. 141. Hansard testified that he responded to Ms. Miller: "Yes. I probably could handle it because I have done hard work all my life," but "I would rather not do it if I could get out of it." II Tr. 32 Ms. Miller's version was different. She testified that Hansard refused the job and that she told Hansard that the only alternative was unemployment. II Tr. 132. Hansard testified there was "no way" he refused a job and that [t]here is nobody in there that I would think that I left [with] the impression that I wouldn't do it, because I was willing to do it." II Tr. 33. Hansard, who was fifty-nine, was replaced by a twenty-five-year-old man. II Tr. 4, 104.

Actions after the meeting increase the confusion. Pepsi's personnel forms indicate Hansard "left work," not that he was either fired or quit. II Tr. 163. Pepsi did not oppose Hansard's application for unemployment benefits, which they were entitled to do if he had quit. II Tr. 172, 178.

Finally, this incident occurred only seven months before Hansard's pension rights were to vest. II Tr. 40.

In August 1983, Phillip Garcia, the regional sales manager, sought to create a "checker" position at the Fort Worth Pepsi plant. IV Tr. 10, 12. He asked Charles Miller, the warehouse manager, to fill the position. III Tr. 10, 18-19. Miller contacted Hansard, who was interested in the position, and recommended that Hansard be hired. II Tr. 19-20. Pepsi's Employee Relations Department rejected this request, citing a company policy that forbade rehiring former employees. III Tr. 20-21; IV Tr. 15-16. Miller testified that he had never heard of such a policy. III Tr. 27. Miller further testified that he believed that Hansard was not rehired because of Pepsi's "youth movement." III Tr. 17. Pepsi was unable to produce any documentary evidence of the "no rehire" policy. Later, a twenty-three or twenty-four-year-old man was hired for this position. III Tr. 28.

A jury trial was held in July 1986. The jury returned a verdict in favor of Hansard. R. 531-37. Hansard was awarded $61,149.44 in back wages (wages from the date of termination to trial) and $45,496.40 as front pay (lost wages from the date of trial until Hansard's retirement). The jury also found that Pepsi's actions were willful. See R. 532, 535.

The trial court refused to grant Pepsi's motion for J.N.O.V. It declined to award Hansard liquidated damages, however, ruling that by carrying Pepsi's motion for a directed verdict, it could review the sufficiency of the evidence on this issue. R. 784. The court also denied Hansard's request for prejudgment interest on Hansard's back pay award. R. 629-30.

We shall address the following issues in the order and under the headings indicated:

II. THE DENIAL OF PEPSI'S J.N.O.V. MOTION

A. Discharge
B. Age Discrimination
C. Refusal to Rehire

III. ADMISSION OF CHARLES MILLER'S OPINION

IV. PEPSI'S OBJECTIONS TO THE JURY INSTRUCTIONS

V. THE PROPERTY OF HANSARD'S MONETARY RECOVERY

A. Front Pay

B. Back Pay

VI. THE ISSUES RAISED BY HANSARD'S CROSS-APPEAL

II.

DENIAL OF PEPSI'S J.N.O.V. MOTION

A. *Discharge*

Pepsi first argues that the trial court erred in refusing to grant its motion for J.N.O.V. because there was insufficient evidence to support the jury's finding that Hansard was discharged. The proper standard for reviewing the trial court's refusal to grant a motion for J.N.O.V. was set out in *Boeing Co. v. Shipman:*

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting the motion is proper. On the other hand, if there is . . . evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied . . .

411 F.2d 365, 374 (5th Cir.1969) (en banc).

[1] The evidence in this case supported neither side overwhelmingly. It follows that there is sufficient evidence to support the jury's determination that Hansard was discharged. The jury was free to believe Hansard when he testified that he did not refuse any job that was offered to him. II Tr. 32. The fact that Hansard was the only employee with whom such a meeting was held lends circumstantial support to his testimony, particularly in combination with the absence of any Pepsi records to indicate that Hansard quit and Pepsi's failure to contest Hansard's unemployment benefits.

Pepsi relies on *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984), to argue that Hansard never rebutted its evidence that Hansard voluntarily quit. In *Elliot* this court reiterated that if an employer suggests "an adequate, nondiscriminatory" reason for the plaintiff's discharge, "the trier of fact is not free to disregard that explanation without countervailing evidence . . ." *Id.* at 566.

There was such evidence here. Aside from Hansard's testimony, there were the circumstances of Hansard's meeting, Pepsi's failure to contest payment of unemployment benefits, the ambiguity in Pepsi's own records as to the reason for Hansard's absence, and the inability of Ms. Miller to explain why Pepsi's records failed to indicate that Hansard quit, despite her conclusion that he had. *See* II Tr. 163. This case involved a factual dispute between the witnesses for each party and credibility determinations were made by the jury. *See Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 207 (5th Cir.1986); *see also Bhaya v, Westinghouse Elec. Corp.*, 832 F.2d 258, 262 (3d Cir.1987) ("Evaluation of witness credibility is the exclusive function of the jury, and where the only evidence of intent is oral testimony, a jury could always choose to discredit it."), *cert. denied*, __U.S. ___, 109 S.Ct. 782, __ L.Ed.2d ___ (1988). This is as it

should be. Pepsi is not entitled to a J.N.O.V. on the issue whether Hansard quit his employment.

B. *Age Discrimination*

[2] Next Pepsi argues that there was no evidence that Hansard was terminated because of his age. Under the ADEA, the plaintiff must prove that age was a "determinative factor" in his discharge. *Bohrer v. Hanes Corp.*, 715 F.2d 213, 218 (5th Cir.1983), *cert. denied*, 465 U.S. 1026, 194 S.Ct. 1284, 79 L.Ed.2d 687 (1984); *see Reeves v. General Foods Corp.*, 682 F.2d 515, 523 n. 12 (1982). To repeat, our test is to determine whether "reasonable men" could find sufficient evidence that age was such a factor. *Boeing*, 411 F.2d at 374.

Hansard relied on the testimony of Charles Miller who testified that he believed Hansard was terminated as part of Pepsi's "youth movement." III Tr. 14-17. The challenge to the admissability of this evidence is discussed in Part III *infra*. Although Charles Miller had no first-hand knowledge of the circumstances leading to Hansard's termination, his opinion rested on his experience at Pepsi, as well as the events surrounding Pepsi's refusal to rehire Hansard. III Tr. 17, 21-23. This court has held that testimony of this sort in some circumstances is probative of age discrimination. *See Reeves*, 682 F.2d at 525. Miller's familiarity with Pepsi's hiring policy and its general corporate youth movement was sufficient basis for his opinion. Further, Miller's opinion about Pepsi's refusal to rehire Hansard clearly had sufficient foundation by reason of his proximity to these events.

[3] Two circuits in similar cases have found the mere opinion of another employee, who had no connection with the plaintiff's termination, not to be sufficient by itself to prove age discrimination. *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir.1987); *Gray v. New Engl. Tel. & Tel. Co.*, 792 F.2d 251,254-55 (1st Cir.1986). We need not address that issue because other evidence also supported an inference of age discrimination. Hansard also relied on a

statement by Mark Esselman, who was present at the June 20th meeting. Hansard testified that as the meeting was ending, he remarked "I have done heavy lifting all my life. I am not quite as young as I use to be." Esselman responded, "Yes, its's kind of risky at your age." II Tr 32-33. Hansard also testified that he believed Ms. Miller's question—asking if he could handle the new position—was an indirect reference to his age. II Tr. 73. Indirect references to an employee's age can support an inference of age discrimination. *Cf. Bienkowski v. American Airlines*, 851 F.2d 1503, 1507 (5th Cir.1988) (upholding a district court's refusal to grant summary judgment, stating "we are unwilling to assume that indirect comments about [plaintiff's] age and adaptability are not possibly probative of unlawful discriminatory intent").

Hansard's termination only seven months before his pension benefits were to vest also supports his claim of age discrimination. II Tr. 42-43. Pepsi responds that its employees present at the June 20th meeting were unaware of the pension issue and that the timing of the meeting was attributable to Pepsi's reorganization. The timing of a termination can raise an inference of discrimination. *See Reeves*, 682 F.2d at 525. The jury was entitled to disbelieve Pepsi's explanation.

Finally, Hansard testified that he believed he was discriminated against because of his age. *See* II Tr. 40. While this testimony alone cannot support an inference of age discrimination, *see Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312, 1316 (5th Cir.1986); *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247 (5th Cir.1985), it does draw strength from the very ambiguity of the June 20th meeting.[1]

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[1] Hansard also argues that Pepsi's emphasis on youth in its advertising suggests that he was a victim of discrimination. Ms. Michael Miller, a former employee of Pepsi's personnel department, testified that this theme was emphasized in the company's college recruitment efforts. II Tr. 146-47. She denied, however, that the advertising theme had any influence

(footnote continued on next page)

[4] Hansard's case is not as strong as it might be, but based on this accumulation of circumstantial evidence, "reasonable men could differ" about the presence of age discrimination. We must respect the jury's determination.

C. *Refusal To Rehire*

[5] Pepsi next argues that reasonable men could not believe that its refusal to rehire Hansard was discriminatory. Pepsi contends that its policy of refusing to rehire exemployees fully explains its decision not to rehire Hansard for the checker position. This explanation, as pointed out earlier, was directly contradicted by Charles Miller's testimony that he believed Hansard was not rehired because of his age. III Tr. 21, 23. Charles Miller also testified that he was unaware of a no-rehire policy that would preclude Hansard's return to Pepsi. III Tr. 27. Perhaps even more probative of Hansard's position is that Pepsi failed to produce any documentary evidence supporting the existence of its alleged policy. Once more we are unwilling to disturb the jury's findings.

III.
ADMISSION OF CHARLES MILLER'S OPINION

[6] To destroy a major support of the verdict, Pepsi asserts that the trial court's admission of Charles Miller's testimony was error. There is no indication that Miller had any first-hand knowledge of the events surrounding Hansard's termination. III Tr. 14-17. Nonetheless, the trial court's admission of lay opinion testimony will be reversed only for an abuse of discretion. *Scheib v. Williams-McWil-*

(footnote continued from preceding page)

on its hiring decisions. II Tr. 147. In *Williams v. General Motors Corp.*, we stated that "the bare fact that an employer encourages employment of recent college . . . graduates does not constitute unlawful age discrimination." 656 F.2d 120, 130 n. 17 (5th Cir.1981), *cert. denied,* 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982). Thus, this evidence does not support Hansard's claim.

liams Co., 628 F.2d 509, 511 (5th Cir.1980). Fed. R.Evid. 701 requires only that opinions by lay witnesses be "rationally based on the perception of the witness and . . . helpful to . . . the determination of a fact in issue."

Courts often have permitted lay witnesses to express opinions about he motivation or intent of a particular person if the witness has an adequate opportunity to observe the underlying circumstances. In *Torres v. County of Oakland*, 758 F.2d 147, 149-50 (6th Cir.1985), a witness who had participated in the process of filling a supervisor role was permitted to testify that she believe the plaintiff had been discriminated against because of her national origin. In *John Hancock Mut. Life Ins. Co. v. Dutton*, 585 F.2d 1289 (5th Cir.1978), a husband died during an altercation with his wife; John Hancock contended that the death was not accidental. The plaintiff's daughter, who observed the altercation, was permitted to testify that she did not believe that her stepfather thought her mother would shoot him. *Id.* at 1293-94. Similarly, in *Samples v. City of Atlanta*, 846 F.2d 1328, 1334 (11th Cir.1988), a "long time" Atlanta police officer was allowed to testify that there was an unwritten policy encouraging police brutality in the department. The Seventh Circuit, moreover, permitted a witness who had observed an arrest to testify that she believed the arrest was motivated by racial prejudice. *Bohannon v. Pegelow*, 652 F.2d 729, 732 (7th Cir.1981). *See also United States v. Smith*, 550 F.2d 277, 281 (5th Cir.) (coworker permitted to testify that defendant understood CETA regulations he was charged with violating), *cert. denied*, 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977); *cf. United States v. Hoffner*, 777 F.2d 1423, 1425 (10th Cir.1985) ("[C]ourts have been very liberal in admitting witnesses' testimony as to another's state of mind if the witness has had a sufficient opportunity to observe the accused so as to draw a rational conclusion about the intent of the accused.").

Admittedly, Miller's testimony is not strongly supported; Pepsi asserts, accordingly, that, under *Mitroff v. Xomox*

Corp., 797 F.2d 271, 275-76 (6th Cir.1986), Miller's testimony should have been excluded. The Sixth Circuit in *Mitroff* held that the admission of one employee's testimony concerning a statement by an assistant personnel manager that there was age discrimination in the corporation was error. The court held that Rule 701 could not be satisfied since there was no basis for the witnesses' testimony because the personnel manager denied making the statement and because no other basis for the opinion was disclosed. *Id.* at 276. But, in this case, Miller's testimony was based on his own experience in the corporation, not a hearsay statement by a third party. *Mitroff* is not controlling.

[7] We conclude, with some hesitancy it must be admitted, that the trial court did not abuse its discretion in admitting this testimony. The decisive factor, we readily acknowledge, is that the district court is best suited to determine whether Fed.R.Evid. 701 has been satisfied.

> Basically, Rule 701 is a rule of discretion. . . . The trier of fact can normally be depended upon . . . to pick up the non-verbal signals, which, although absent from the record, indicate fairly clearly when the witness is describing what he saw and when he is describing what he thinks happened; the trier of fact also should generally be depended upon to give whatever weight or credibility to the witness' opinion as may be due.

3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 701[02], at 701-31 to -32 (1988) (footnotes omitted).

IV.
PEPSI'S OBJECTIONS TO THE JURY INSTRUCTIONS

[8] Pepsi also complains of the district court's refusal to include two jury instructions. The issue is whether the trial court abused its discretion in so refusing. *See Bryan v. Cargill, Inc.*, 723 F.2d 1202, 1204 (5th Cir.1984). Pepsi's first proposed instruction stated that Hansard must prove "that his leaving Pepsi-Cola's employment was the result of

a decision by Pepsi-Cola to refuse to allow him to continue working, rather than a result of Plaintiff's failure or refusal to accept an offer of continuing employment." R. 400. The trial court rightfully considered this more favorable to Pepsi than was proper. Instead, the trial court drew upon terms in common every day use and instructed the jury that "discharged" meant "terminated" or "fired." The trial court's refusal was not an abuse of discretion.

[9] Pepsi next insists that the trial court erred in submitting the "pretext" theory for Hansard's discharge. This theory was embodied in the charge to the jury that it could "consider whether the employer has engaged in a pattern of practice of discrimination against its older employees." IV Tr. 134. Charles Miller's testimony constitutes some evidence of a pattern or practice of discrimination. The trial court did not abuse its discretion in submitting this theory to the jury.

V.
THE PROPRIETY IF HANSARD'S MONETARY RECOVERY

A. *Back Pay*

We now confront the issues of damages. Pepsi argues that Hansard was not entitled to back pay after March 1984.

Hansard testified that after his discharge in 1980 that he attempted to find other work. He applied for a variety of positions with no success. II Tr. 46-47, 75, 175-76. In March 1984 Hansard abandoned his job search and began running a booth at flea markets. Hansard testified that he first sold various odds and ends from his home. II Tr. 39. Later, he bought some merchandise for resale. II Tr. 49-50. The flea market operated only on weekends. II Tr. 80. Hansard's flea market booth never turned a profit, and he abandoned it in December 1985. II Tr. 47-51. After December, he stopped looking for work altogether and began receiving Social Security early retirement benefits.

[10] The ADEA requires a plaintiff to use reasonable efforts to obtain other employment after he is terminated. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 809 (8th Cir. 1982); *EEOC v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980).

Hansard clearly is not entitled to back pay after December 1985 because, by his own admission, he stopped looking for work. A plaintiff may not simply abandon his job search and continue to recover back pay. *See, e.g., Blizzard v. Newport News Redev. & Hous. Auth.*, 635 F.Supp. 23, 26 (E.D.Va.1985); *Weatherspoon v. Andrews & Co.*, 32 Fair Empl.Prac.Cas. (BNA) 1226, 1229 (D.Colo.1983).

Whether Hansard's back pay entitlement terminated after March, 1984, is a closer question. Nonetheless, we believe Pepsi is right. From the record we conclude that a rational trier of fact could not find that Hansard satisfied his statutory duty to mitigate damages by engaging in his flea market business. A plaintiff's decision to become self-employed, alone, does not indicate a lack of reasonable diligence. *See Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1005 (3d Cir.1988); *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1471 (11th Cir.1985). That is not the case here. In this case Hansard's efforts were simply insufficient. The flea market business was never more than a part-time enterprise. Hansard was fully capable of continuing his job search during the week. Further, Hansard did not approach the flea market as a business, rather he primarily gathered odds and ends from his home and sold them.

This court's decision in *NLRB v. Armstrong Tire & Rubber Co.*, 263 F.2d 680 (5th Cir.1959), is dispositive. There we held that the plaintiff did not satisfy his statutory duty under the National Labor Relations Act to mitigate damages when he began working in his wife's business. *See id.* at 683-84 & n. 4. The court noted that the business never turned a profit and was ultimately sold for the price of its inventory and equipment. *Id.* at 684 n. 4. In addition, once Hansard found the business unsuccessful, his duty to miti-

gate damages required him to resume his search for other employment. *See Boyd v. SCM Allied Paper Co.*, 42 Fair Empl.Prac.Cas. (BNA) 1643, 1655 (N.D.Ind.1986) [1986 WL 15558].

[11] We conclude that Hansard failed to use reasonable diligence to mitigate his damages after March, 1984, and remand the case for recalculation of back pay damages.

B. *Front Pay*

Pepsi also claims that the district court erred in awarding Hansard front pay. Part of our difficulty in addressing this issue arises because Congress did not specify what remedies are available to aggrieved plaintiffs. Rather, Congress granted courts broad authority to fashion relief.

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter. . . .

29 U.S.C. § 626(b) (1982). In fashioning remedies under the ADEA, we must remember that the purpose of Congress was to make the plaintiff whole. *See Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir.1984); *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 118 (4th Cir.1983); *Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir.1983); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir.1982); *Rodriguez v. Taylor*, 569 F.2d 1231, 1238 (3d Cir.1977), *cert. denied*, 436 U.S. 913 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978). ADEA remedies are not to punish. *See* H.R.Rep. No. 950, 95th Cong. 2d Sess. 13, *reprinted in* 1978 U.S.Code Cong. & Ad.News 528, 535 ("The ADEA as amended by this act does not provide remedies of a punitive nature.").[2]

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[2] Consistent with this congressional mandate, courts have held that ADEA plaintiffs are not entitled to punitive damages or damages for pain and suffering. *See* 3A A. Larson & L. Larson, *Employment Discrimination* §§ 103.51, 103.53 (1988).

[12] "Front pay" refers to future lost earnings. Courts have permitted ADEA plaintiffs to recover "front pay" in addition to the usual award of back pay. Hawks, *Future Damages in ADEA Cases*, 69 Marq.L.Rev. 357, 362 (1986); Marion, *Remedies Under the ADEA*, 45 Md.L.Rev. 298, 331 (1986).[3] This court has suggested that front pay may be an appropriate remedy in ADEA cases, *See Smith v. Office of Personnel Management*, 778 F.2d 258, 262 n. 2 (5th Cir.1985) ("[W]e note that . . . where the plaintiff is unable as a result of discrimination to earn his livelihood, an award of front pay probably would be necessary to 'effectuate the purposes of the Act,' " quoting 29 U.S.C. § 626(b) (1982)), *cert. denied*, 476 U.S. 1105, 106 S.Ct. 1949, 90 L.Ed.2d 358 (1986). An award of "front pay" is not inherently punitive.

However, consistent with the Act's "make-whole" philosophy, front pay is available only in limited circumstances. The Courts have a decided preference for reinstatement instead of front pay. It has been held that front pay cannot be recovered unless the plaintiff shows that reinstatement is not feasible. *Blum v. Witco Chem. Corp.*, 829

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[3] *See McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 118, (7th Cir.1986), *cert. denied*, U.S. , 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 614-16 (1st Cir.1985); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 795-97 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057, 106 S.Ct. 796, 88 L.Ed.2d 773 (1986); *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 748 F.2d 1543, 1551 (11th Cir.1984); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 726 (2d Cir.1984); *Davis*, 742 F.2d at 922-23; *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir.1984), *vacated on other grounds*, 469 U.S. 1154, 105 S.Ct. 896, 83 L.Ed.2d 913 (1985); *Gibson*, F.2d at 1100; *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859, 103 S.Ct. 131, 74 L.Ed.2d 113 (1982).

The Fourth Circuit has not addressed the issue. *See generally* Annotation, *Award of "Front Pay" Under § 7 of Age Discrimination in Employment Act of 1967 (29 USCS § 626)*, 74 A.L.R.Fed. 745, § 4 (1985).

F.2d 367, 373 (3d Cir. 1987); *Bruno v. Western Elec. Co.*, 829 F.2d 957, 966 (10th Cir.1987); *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 118 (7th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 616 (1st Cir.1985); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir.1984); *See* Hawks, *supra*, at 365; Marion, *supra*, at 334-35. *See generally* Annotation, *Reinstatement as Remedy for Discriminatory Discharge or Demotion Under Age Discrimination in Employment Act (29 USCS §§ 621 et seq.)*, 78 A.L.R.Fed. 575, §§ 3-4 (1986) [hereinafter Annotation, *Reinstatement*].

[13] In this case, the district court did not consider whether reinstatement was feasible. It merely submitted the issue of front pay to the jury. *See* R. 534, 537. Thus, the district court's award of front pay in this case was improper without a precedent finding that reinstatement was not feasible. *See generally* Annotation, *Reinstatement, supra* §§ 5-11 (collecting cases that discuss factors affecting the availability of reinstatement).

[14] The trial court initially must determine whether a plaintiff is entitled to front pay. It may not submit this issue to a jury. If the trial court concludes that front pay is appropriate, then the jury should determine the amount of damages. *See Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1333 n. 4 (7th Cir.1987), *vacated on other grounds*, ___ U.S. ___, 108 S.Ct. 1990, 100 L.Ed.2d 223 (1988); *Maxfield v. Sinclair, Int'l*, 766 F.2d 788,796 (3d Cir.1985), *cert. denied*, 474 U.S. 1057, 106 S.Ct. 796, 88 L.Ed.2d 773 (1986); *Eivins v. Adventist Health Sys./E. & Middle Am., Inc.*, 660 F.Supp.1255, 1261 (D.Kan.1987). *Contra Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1257-58 (2d Cir.1987); *Gibson*, 695 F.2d at 1100; *Miller v. Pabst Brewing Co.*, 670 F.Supp. 1420, 1421 (E.D.Wis.1987); *Ventura v. Federal Life Ins.*, 571 F.Supp. 48, 51 (N.D.Ill.1983).

Finally, for the benefit of the district court on remand, we note that other courts have held that a plaintiff's failure to

mitigate his damages will usually reduce or perhaps eliminate his entitlement to front pay. *See Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1347 (9th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 785, 98 L.Ed.2d 870 (1988); *McNeil*, 800 F.2d at 118; *Maxfield*, 766 F.2d at 796; *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1173 (10th Cir.), *cert. denied*, 474 U.S. 946, 106 S.Ct. 312, 88 L.Ed.2d 289 (1985); *Whittlesey*, 742 F.2d at 728-29. Indeed, the Second Circuit stated that the plaintiff's failure to mitigate his damages completely forecloses the availability of front pay. *See Dominic*, 822 F.2d at 1258. Thus, if the district court finds on remand that Hansard cannot be reinstated, the court must consider his failure to mitigate his damages in determining the extent to which, if at all, front pay is appropriate.

VI.

THE ISSUES RAISED BY HANSARD'S CROSS-APPEAL

Hansard's cross-appeal raises two issues. First, he argues that the district court erred in holding that the evidence was insufficient to support the jury's finding that Pepsi's discrimination was willful. R. 532, 536. This finding would have entitled Hansard to liquidated damages. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125, 105 S.Ct. 613, 623-24, 83 L.Ed.2d 523 (1985). However, the district court, on the basis of its insufficiency finding, refused to award liquidated damages. R. 784.

The Supreme Court has held that liquidated damages are a punitive sanction and should be reserved for the most egregious violations of the ADEA. *Trans World*, 469 U.S. at 125, 105 S.Ct. at 623-24. Liquidated damages should not be awarded unless the defendant acted knowingly or recklessly. *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, 287 (5th Cir.1986).

[15] The evidence in this case was weak. There is simply no evidence that Pepsi's actions were so egregious as to justify finding a willful violation *See Smith v. Consolidated Mut. Water Co.*, 787 F2d 1441, 1443 (10th Cir.1986). Pepsi was entitled to judgment on this issue.

Hansard next complained of the trial court's failure to award prejudgment interest. This court has never addressed whether an ADEA plaintiff is entitled to prejudgment interest on his award of back pay. *See Olitsky v. Spencer Gifts, Inc.*, 842 F.2d 123, 126 n. 1 (5th Cir.), *cert. denied*, — U.S. —, 109 S.Ct.301, 102 L.Ed.2d 326 (1988).

All of the courts that have addressed the issue have concluded that prejudgment interest should be awarded to ADEA plaintiffs who are not awarded liquidated damages.[4] *Reichman v. Bonsignore, Brignati & Mazzota P.C.*, 818 F.2d 278, 281 (2d Cir.1987); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1101 (11th Cir.1987); *Berndt v. Kaiser Aluminum & Chem. Sales, Inc.*, 789 F.2d 253, 259-60 (3d Cir.1986); *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1479 (10th Cir.), *cert. denied*, 469 U.S. 874, 105 S.Ct. 233, 83 L.Ed.2d 161 (1984; *Gibson*, 695 F.2d at 1102 n. 9; *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 489 (4th Cir.1982);

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[4] Courts are split on the question of whether a plaintiff who recovers liquidated damages may also recover prejudgment interest. *Compare Reichman v. Bonsignore, Brignati & Mazzota, P.C.*, 818 F2d 278, 281 (2d Cir.1987) (permitting recovery of both) *and Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 (11th Cir.1987) (same) *with Blim v. Western Elec. Co.*, F.2d 1473, 1479-80 (10th Cir.), *cert. denied*, 469 U.S. 874, 105 S.Ct. 233, 83 L.Ed.2d 161 (1984) (holding that ADEA plaintiffs may not recover prejudgment interest if they recover liquidated damages) *and Rose v. National Cash Register Corp.*, 703 F.2d 225, 230 (6th Cir.) (same), *cert. denied*, 464 U.S. 939, 104 S.Ct. 352, 78 L.Ed.2d 317 (1983) *and Gibson*, 695 F.2d at 1101-03 (same) *and Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir.1982) (same); *and Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir.) (same), *cert. denied*, 454 U.S. 860, 102 S.Ct. 316, 70 L.Ed.2d 158 (1981).

Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 162 (7th Cir.1981); *Kelly v. American Standard Inc.*, 640 F.2d 974, 982 (9th Cir.1981); *see* Marion, *supra*, at 338-39. The primary rationale for this conclusion is that unlawful discrimination deprives an employee of his salary as well as the *use* of that salary during the interim period. *Heiar v. Crawford County*, 746 F.2d 1190, 1201-03 (7th Cir.1984) (Posner, J.), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985); *see also Reichman*, 818 F.2d at 281 ("[P]rejudgment interest is designed to compensate the plaintiff for the loss of the use of money wrongfully withheld through an unlawful discharge."). Thus, awarding prejudgment interest is consistent with the purpose of the ADEA, *i.e.*, making the plaintiff whole. *Cf. Rodgers v. United States*, 332 U.S. 371, 373, 68 S.Ct. 5, 6-7, 92 L.Ed. 3 (1947) (stating that in deciding whether interest is appropriate in a given case, the court should consider congressional intent).

Pepsi argues that prejudgment interest in not available under the ADEA. It points out, correctly, that the remedial provisions of the ADEA were modeled after those of the Fair Labor Standards Act (FLSA). *See* H.R.Rep. No. 805, 90th Cong. 1st Sess. (1967). *reprinted in* 1967 U.S.Code Cong. & Admin.News 2213, 2218; Marion, *supra*, at 301; Note, *Set-Offs Against Back Pay Awards under the Federal Age discrimination in Employment Act*, 79 Mich.L.Rev. 1113, 1113 (1981). Because prejudgment interest generally is not recoverable under the FLSA, Pepsi argues, ADEA plaintiffs are also precluded from recovering prejudgment interest. This court's position on the availability of prejudgment interest under the FLSA, however, is not entirely consistent. *Compare Peters v. City of Shreveport*, 818 F.2d 1148, 1168-69 (5th Cir.1987) (refusing to award prejudgment interest under § 216 of the FLSA), *cert. dismd.*, —— *U.S.* ——, *108 S.Ct. 1101-02, 99 L.Ed.2d 264 (1988) and Hill v. J.C. Penney Co.*, 688 F.2d 370, 375 n. 4 (5th Cir.1982) (same) *and Foremost Dairies, Inc. v. Ivey*, 204 F.2d 186, 190 (5th Cir.1953) (same) *with Marshall v. Hope Garcia Lancarte*, 632 F.2d 1196, 1199 (5th Cir.1980) (permitting

prejudgment interest award under § 217 of the FLSA) *and Brennan v. City Stores, Inc.*, 479 F.2d. 235, 242 (5th Cir.1973) (same).

The fact that prejudgment interest is not recoverable under the FLSA, however, does not compel the conclusion that prejudgment interest is not recoverable under the ADEA. As the Supreme Court has noted, the remedial provisions of the two acts "are not identical." *Trans World*, 469 U.S. at 125, 105 S.Ct. at 623-24. The FLSA has no equivalent to 29 U.S.C. § 626(b) (1982) which grants courts broad authority to fashion equitable remedies. *Cf.* 29 U.S.C. § 216(b) (1982) (providing for an award of "unpaid minimum wages, or . . . unpaid overtime compensation . . . and an additional amount as liquidated damages"). Other courts have rejected similar arguments. *See, e.g., Lindsey*, 810 F.2d at 1101.

[16] We conclude that the trial court erred in holding that prejudgment interest was not available under the ADEA. Accordingly, we remand the case for further consideration. *See Heiar*, 746 F.2d at 1203.

VII.
CONCLUSION

In sum, we conclude that there was sufficient evidence to support the jury's verdict that Hansard was discriminated against because of his age. However, we reverse the district court's award of damages and remand the case for recalculation of damages. We conclude that Hansard was not entitled to liquidated damages. Finally, we reverse the district court's order denying prejudgment interest.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

JERRE S. WILLIAMS, Circuit Judge, concurring in part and dissenting in part.

I concur fully in Judge Sneed's opinion for the Court in all parts except the consideration of and holdings as to damage issues in part V.

The opinion of the Court is correct in holding that starting in December 1985, appellee was not entitled to back pay because he abandoned job hunting efforts and took early retirement under social security. I think it's regrettable that appellee was forced into this alternative because the need of income made it necessary for him to do so. But I agree that under the law he was not entitled to an award of back pay following that date.

But I dissent from the conclusion in the opinion of the Court that the jury verdict must be upset with respect to back pay for the period from March 1984 until December 1985. Until March 1984, appellee engaged in an intensive search for comparable work. The jury had the right to believe his testimony to this effect and also that it was corroborated by the Regional Director of the Texas Employment Commission who received reports of these job hunting efforts.

In March 1984, at the age of 61, he undertook the establishment of a "flea market" business. Admittedly it began as a small operation. He was not a capitalist, and he had been fired from his income source in violation of law by the appellant. The jury had the right to believe his testimony that he continued his search for a job, but not with the prior intensity and also his testimony that if he had obtained such a job he would have taken it immediately. He tried to build up this small part-time operation from scratch into a business which would yield him some income. He did not succeed, and a little over a year later he finally gave up. On the basis of this evidence the jury had the right to conclude that appellee was continuing to attempt to mitigate his losses from his wrongful discharge during the period he undertook to establish this business.

The majority takes the position that our decision in *NLRG v. Armstrong Tire & Rubber Co.*, 263 F.2d 680 (5th Cir.1959) "is dispositive" to the contrary. In that case an employee was wrongfully discharged under the National Labor Relations Act. He attempted unsuccessfully to justify mitiga-

tion of back pay damages by going to work in his wife's business, a small drive-in store, which had never made a profit. There are two distinctions between the *Armstrong Tire & Rubber* case and the case before us. The first is that the discharged employee was not undertaking to establish a business but was moving into a business already established without really expecting to get any substantial amount of income. The major distinction, significant and critical, is that the discharged employee never undertook to look for a job but simply immediately went to work in his wife's business.

What the majority opinion is saying in this case is that even though a wrongfully discharged employee fairly close to the age of retirement has intensively looked for work for a substantial period of time without success, he cannot then undertake the relatively slow and difficult process of trying to establish a business of his own on absolutely minimum capital as a means of earning income and mitigating damages. There is no law compelling this result. And there clearly is enough evidence in the record to indicate that this is exactly what this wrongfully discharged employee was trying to do. There may be evidence to the contrary, but the question was one for the jury. We do not have the authority to upset that jury verdict.

On the issue of front pay the Court is properly returning the case to the district court for an evaluation of the award of front pay. Some limitations may need to be placed upon it. At least it can be argued that not all of the critical factors were considered. While I concur in returning the issue of front pay to the district court for re-examination, I do not join in all of the observations and implications in the majority opinion. It is quite true that front pay is a substitute for reinstatement. Appellee should have been reinstated by the company. But is is unrealistic to talk of reinstatement now, although the majority opinion does, when he is 65 years old and when he was 64 years old when the district court made its decision. The only practicable

remedy to compensate this appellee for the wrongful act of the appellant is the awarding of front pay. If appellant had carried out its obligations under the statute, appellee would have been reinstated in 1983. He would have enjoyed the normal expectation, which he testified was his reasonable expectation, that he would work with the company until the age of 65 and then retire. This evidence, which must be accepted, creates a classic case for front pay. This is the only way that the plaintiff can be made whole as a means of effectuating the purposes of the act. *Smith v. Office of Personnel Management*, 778 F.2d 258-262 (5th Cir. 1985), *cert. denied*, 476 U.S. 1105, 106 S.Ct. 1949, 90 L.Ed.2d 358 (1986).

The majority opinion was extremely predantic in concluding that the district court prior to awarding front pay was required in this case to have made its own verbalized finding that reinstatement was not feasible. It was obvious on its face that reinstatement of this man, almost 64 years old, was not feasible. The finding is clearly implied in this case in submitting the issue to the jury, although of course the court can make such a verbalized finding as a matter of form on the remand. My conclusion finds support in a wise dictum in *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 923 (6th Cir.1984) in upholding a front pay award for an illegally discharged 59 year old employee. The court said that the failure to award front pay to a 63 year old victim of discriminatory discharge "might be an abuse of discretion." The court went on to say, " . . . [T]hat which makes people whole is a matter of discretion for the trial court under the facts and circumstances of the individual case."

Finally, I agree with the opinion for the Court that the issue of mitigation in awarding front pay is not clearly resolved by prior court opinion. What is critical in evaluating the role of mitigation is the recognization, as the opinion for the Court does recognize, that the basic thrust of the statute is to make the employee whole for his losses as a result of the improper discharge. The rules with respect to

mitigation in the award of back pay are not controlling. Even though front pay is not punitive, it has the function of being awarded in addition to back pay in lieu of reinstatement for the purpose of trying to make the employee whole for the wrong done to him.

In my view, on remand, the issue of the amount of front pay should be determined following these established principles, but the clear implication in the majority opinion is that any award of front pay is questionable because of a lack of mitigation. I do not find this implication acceptable. If there is a lack of mitigation, it is only one factor to be considered in awarding front pay in this case. Discharge only seven months before appellee's pension was to vest is certainly another. The later refusal to rehire appellee in another vacant job to which be obviously was suited is another. In sum, appellant was obligated by its violation of the law to reinstate appellee. It did not do so. The statutory policy requires that the judgment of the court came as close as possible to making the victim whole for this violation of the law. 29 U.S.C. § 626(b). Only a substantial front pay award can approach the satisfaction of that objective.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ANDREW W. HANSARD

VS.

PEPSI-COLA METROPOLITAN
BOTTLING COMPANY, INC., d/b/a
PEPSI-COLA BOTTLING GROUP

CIVIL ACTION NO. 4-84-318-E

JUDGMENT

On July 25, 1986, this action came on for trial before the Court and jury, the Honorable Eldon B. Mahon, United States District Judge, presiding, wherein the Plaintiff, Andrew W. Hansard, alleged that Defendant had violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* by terminating his employment on June 20, 1983 and refusing to later rehire him for the position of Checker in August or September of 1983 due to his age.

The issues were duly tried, and the jury rendered a verdict upon special interrogatories wherein it found that Plaintiff was terminated and refused rehire into the Checker's position, that age was a determining factor in each instance and that said acts were willful.

It is therefore ORDERED and ADJUDGED that Plaintiff, Andrew W. Hansard, recover of and from the Defendant, Pepsi-Cola Metropolitan Bottling Co., the sum of Sixty-One Thousand One Hundred Forty-Nine and 44/100 Dollars ($61,149.44), as lost wages and benefits from the time of his termination to the time of trail; the sum of Forty-Five Thousand Four Hundred Ninety-Six and 40/100 Dollars

($45,496.40) as lost wages and benefits from the time of trial to November 1, 1988 (the date upon which plaintiff testified he would have retired; totaling the sum of One Hundred Six Thousand Six Hundred Forty-Five and 84/100 ($106,645.84) as liquidated damages pursuant to 29 U.S.C. § 626(b) and reasonable and necessary attorney's fees in the sum of $30,034.50, all of which shall bear interest from the date of judgment until paid at the rate of 5.77 percent.

Entered this 18th day of December, 1986.

/s/ ELDON B. MAHON

Eldon B. Mahon
United States District Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ANDREW W. HANSARD

VS.

PEPSI-COLA METROPOLITAN
BOTTLING COMPANY, INC., d/b/a
PEPSI-COLA BOTTLING GROUP

CIVIL ACTION NO. 4-84-318-E

AMENDED JUDGMENT

Due to ambiguities in the Court's Judgment of December 18, 1986 the Court enters this amended judgment as the final judgment in this case.

On July 25, 1986, this action came on for trial before the Court and jury, the Honorable Eldon B. Mahon, United States District Judge, presiding, wherein the Plaintiff, Andrew W. Hansard, alleged that Defendant had violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* by terminating his employment on June 20, 1983 and refusing to later rehire him for the position of Checker in August or September of 1983 due to his age.

The issues were duly tried, and the jury rendered a verdict upon special interrogatories wherein it found that Plaintiff was terminated and refused rehire into the Checker's position, that age was a determining factor in each instance and that said acts were willful.

It is therefore ORDERED and ADJUDGED that Plaintiff, Andrew W. Hansard, recover of and from the Defendant, Pepsi-Cola Metropolitan Bottling Co., the sum of Sixty-

One Thousand One Hundred Forty-Nine and 44/100 Dollars ($61,149.44), as lost wages and benefits from the time of his termination to the time of trail; the sum of Forty-Five Thousand Four Hundred Ninety-Six and 40/100 Dollars ($45,496.40) as lost wages and benefits from the time of trial to November 1, 1988 (the date upon which plaintiff testified he would have retired; totaling the sum of Four Hundred Ninety-Six and 40/100 Dollars ($45,496.40) as lost wage and benefits from the time of trial to Novembner 1, 1988 (the date upon which plaintiff testified he would have retired); totaling the sum, of One Hundred Six Thousand Six Hundred Forty-Five and 84/100 ($106,645.84) and reasonable and necessary attorney's fees in the sum of $30,034.50, all of which shall bear interest from the date of judgment until paid at the rate of 5.77 percent. Pursuant to 29 U.S.C. § 626(b) the Court has considered the awarding of liquidated damages but under the facts of this case, the Court declines to award liquidated damages.

Entered this 23rd day of December, 1986.

/s/ ELDON B. MAHON

Eldon B. Mahon
United States District Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ANDREW W. HANSARD

VS.

PEPSI-COLA METROPOLITAN
BOTTLING COMPANY, INC., d/b/a
PEPSI-COLA BOTTLING GROUP

CIVIL ACTION NO. 4-84-318-E

MEMORANDUM OPINION

The plaintiff herein has fild a motion for judgment and petition for attorney's fees based on the verdict rendered in this case on July 31, 1986. The defendants have filed a response to the motion opposng the form of the judgment and the amount of attorney's fees requested. Additionally, both parties have filed supplemental replies. After carefully considering the materials filed and the applicable law, the Court comes to the following decision.

The Fifth Circuit has adopted the "lodestar" method of calculating attorneys' fees, which is a refinement of the earlier test in *Johnson v. Goergia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Graves v. Barnes,* 700 F.2d 220, 222 (5th Cir. 1983). The first step is to determine the prevailing rate in the community for similar work and then multiply it by the reasonable number of hours expended. *Hensley v. Eckerhart,* 461 U.S. 424 (1983).

Terry Casey, plaintiff's lead counsel, has submitted the time sheets for the hours he and Art Brender have worked on this case. In total he states that 273.25 hours were spent on this case at the rate of $175.00 an hour and he requests a

fee in the amount of $47,818.75. The breakdown in rate requested and hours spent by each of the attorneys is as follows:

	Rate	Hours
Casey	$175.00	255.75
Brender	175.00	17.50
		273.25

Defendant's attorney strenuously disputes the hourly rate requested by Messrs. Casey and Brender and also asks the Court to reduce the total number of hours by 17.75 hours for purely clerical or non-legal functions, duplicative time charged Messrs. Casey and Brender and resistance to and request for reconsideration of the protective order granted to defendant.

The Court finds that the hourly rate of $175.00 requsted by plaintiffs counsel for Messrs. Casey and Brender is excessive. In conformity with the rates charged by attoneys in Fort Worth with similar experience and background the Court sets Mr. Casey's rate at $110.00 an hour and Mr. Brender's rate at $150.00 an hour. The Court also reduces the number of hours requested by plaintiff by 13 hours (8 of Mr. Casey's hours and 5 of Mr. Brender's hours). The reduction of hours is as follows: 2.5 hours for the clerical function of receiving documents on 8/23/84, 9/4/84, 12/10/84, 1/15/85, 1/23/85, 2/11/85, 4/11/86, 4/28/86, 5/12/86 and 6/27/86; 3 hours for traveling to the library and other locations to copy documents on 3/3/86; 3/4/86 and 3/7/86; 1 hour for driving Hansard from his home in Watauga to his deposition presumably in Fort Worth; 5 hours of Mr. Brender's time which was dupliative of Mr. Casey's time; and 1.5 hours for seeking reconsideration of the Court's order granting pepsi-Cola's motion for a protective order.

In summary, the Court finds that the lodestar figure for attorneys' fees in this case is $29,127.50. This figure repre-

sents 247.75 hours of Mr. Casey's time at $110.00 an hour and 12.5 hours of Mr. Brender's time at $150.000 an hour.

The lodestar figure may be adjusted to reflect other factors in the case, such as the contingent nature of the suit and the quality of the representation. *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1093 (5th Cir. 1982). Under the rubric of the "contingent nature of the lawsuit" the Court must analyze the plaintiff's burden, including the complexity of the case, the probability of the defendant's liability and the "provability" of the damages. The Court must also consider the risks assumed in developing the case, including the number of hours of labor risked without guarantee of remuneration, the amount of out-of-pocket expenses advanced, and the development of prior expertise in this area of litigation. The Court may also take into consideration the delay, if any, in receipt of payment for services rendered.

The Court finds that this case was a straight forward claim of individual discrimination with no class implications nor any unusual factual or legal complexities. The Court further finds that once liability was established, damages were not difficult to ascertain. Additionally, the Court finds that while the case was accepted on a contingency basis that fact alone does not support an enhancement of the lodestar fee. *Wheeler v. Mental Health & Retardation Authority,* 752 F.2d 1063, 1073 (5th Cir.) *cert. denied,* 106 S.Ct. 78 (1985). In considering the final two factors, the Court finds that plaintiff's counsel appeared thoroughly familiar with the litigation and that the official record does not indicate whether plaintiff's counsel received any remuneration from the plaintiff to cover the costs of such items as depositions and filing fees; however, from the list of expenses submitted by plaintiff totalling $907.00, the Court assumes that no such remuneration was provided by plaintiff. In summation, the Court finds that the lodestar figure is increased by $907.00 (costs) but that none of the other factors herein

mentioned merits an increase in the lodestar figures. Thus, the total fee award in this case total $30,034.50.

The lodestar figure also may be adjusted through the use of a multiplier to reflect the quality of the representation. *Graves v. Barnes*, 700 F.2d 220, 223 (5th Cir. 1983). The Court may consider the result obtained and the professional methods used in processing the case. *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 117-18 (3rd Cir. 1976) (en banc). The quality of an attorney's work, in general, is a component of the reasonable hourly rate, an increase or decrease should be given under this category only when the attorney displays a skill above or below that expected for lawyers of the caliber reflected in the hourly rates. An increae or decrease reflects exceptional services only, and is considered in the nature of a bonus or penalty. *Id.* In fact, the Supreme Court has indicated that "'result obtained' generally will be subsumed within other factors used to calculate a reasonable fee, [and] it normally should not provide an independent basis for increasing the fee award." *Blum v. Stenson*, 104 S.Ct. 1541, 1549 (1984).

The Court recognizes that plaintiff's counsel obtained a favorable judgment for the plaintiff. In addition, the Court was pleased with the presentation of the plaintiff's case by counsel. However, the Court does not find that either of these two factors requires the Court to augment the attorneys' fees. Rather, the lodestar figure of $30,034.50 heretofore discussed adequately reflects the skill level demonstrated by plaintiff's counsel.

The remaining question before this court is whether the plaintiff is entitled to prejudgment interest under the A.D.E.A. Defendant argues that the Fifth Circuit has repeatedly held that prejudgment interest is not available in an action such as this which is brought under the remedial provisions of § 216 of the Fair Labor Standards Act and even assuming prejudgment interest could be awarded plaintiff has waived any claim to prejudgment interest by

failing to seek it from the jury. Thus, the Court should exercise its discretion and deny an award of prejudgment interest.

Plaintiff claims that the decisions of the Fifth Circuit denying prejudgment interest in actions brought under Section 16(b) of the Fair Labor Standards Act have been impliedly overruled by the United States Supreme Court's interpretation of the statutory purpose of liquidated damages. The Supreme Court found that liquidated damages were punitive. *Western Airlines, Inc. v. Criswell*, 105 S.Ct. 2743 (1985); *TransWorld Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The plaintiff claims that since liquidated damages are punitive in nature and prejudgment interest is not both are recoverable.

The Court disagrees with plaintiff's interpretation of the law. It is well-settled that the Fifth Circuit has uniformly held that prejudgment interest is not available in actions brought under Section 16(b) of the Fair Labor Standards Act, *Reeves v. International Tel. & Tel. Corp.*, 705 F.2d 750 (5th Cir. 1983); *Barcellona v. Tiffany English Pub. Inc.*, 597 F.2d 464 (5th Cir. 1979); *Foremost Dairies, Inc. v. Ivey*, 204 F.2d 186 (5th Cir. 1953). Since the ADEA specifically incorporates Section 216(b) of the F.L.S.A., these decisions are fully applicable here.

When the F.L.S.A. was first passed, the Fifth Circuit, like all other circuits, took the view that liqudated damages were mandatory and that no other recovery, including prejudgment interest was available. *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). The F.S.L.A. was amended so that defendants' employers did not have to pay liqudated damages if they acted in "good faith." Under the amendment, the Fifth Circuit found that liquidated damages were punitive since they were contingent on the employer's degree of culpablity and did not change its view that prejudgment interest was wholly unavailable under § 216(b), even if liquidated damages were denied. *Foremost Dairies*, 204 F.2d at 190. Thus, the recognition that liqui-

dated damages are punitive provides no basis for overlooking *Reeves, Barcellona* and *Foremost Dairies*, each of which was decided in a context in which liquidated damages were "punitive" in nature. Thus, the Court concludes that prejudgment interest is not applicable in this case.

In summation, the Court finds that the plaintiff is entitled to an award of attorneys' fees in the amount of $30,034.50 for trial. A judgment will be entered consistent with this opinion.

Signed this 18th day of December, 1986.

/s/ ELDON B. MAHON

Eldon B. Mahon
United States District Judge

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ANDREW W. HANSARD

VS.

PEPSI-COLA METROPOLITAN
BOTTLING COMPANY, INC., d/b/a
PEPSI-COLA BOTTLING GROUP

CIVIL ACTION NO. 4-84-318-E

ORDER

Now before the Court is defendant Pepsi-Cola Metropolitan Bottling Company's (Pepsi) Motion for Judgment N.O.V. or in the alternative, for a New Trial pursuant to Fed. R. Civ. P. 50(b) and 59(a) to which plaintiff, Andrew W. Hansard, (Hansard) responded and defendant replied. After careful consideration of the extensive briefs and exhibits attached thereto, the pleadings, and the applicable law, the Court comes to the following decision.

Defendant claims that the record in this case contains no evidence that Pepsi descriminated against Hansard on the basis of age. Similarly, defendant asserts that the undisputed evidence establishes that Pepsi's decision not to rehire Hansard was based solely upon the company's no rehire policy and was wholly free of age consideration. Additionally, defendant states that the jury's findings on damages are equally unsupported by the record. In the alternative, defendant requests a new trial due to the erroneous admission of highly prejudicial and irrelevant evidence, the Court's instruction on burden of proof, and the manifest weight of the evidence which Pepsi claims demon-

strates that age played no role in Hansard's loss of employment. Plaintiff submits that there is substantial evidence to support the jury's verdict which found that Pepsi violated the Age Discrimination in Employment Act (ADEA) both when it fired plaintiff and when it refused to rehire him and did so willfully in both instances. Thus, Plaintiff requests that defendant's motion be denied.

The standard set forth by the United States Court of Appeals for the Fifth Circuit for reviewing a judgment notwithstanding the verdict in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc) is the following:

> . . . the [District] Court should consider all of the evidence—not just that evidence which supports the nonmover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is subsantial evidence opposed to the motions, that is, evidence of such quality an weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh confliction evidence and inferences, and determine the credibility of witnesses.

411 F.2d at 374-75

After applying the above-quoted standard to all the evidence presented in the instant case, the Court finds that the evidence is sufficient to support the jury's verdict that Plaintiff was terminated and that age was a factor in such termination.

Accordingly, defendant's Motion for a Judgment Notwithstanding the Verdict is DENIED.

Signed this 20th day of August, 1987.

/s/ ELDON B. MAHON

Eldon B. Mahon
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ANDREW W. HANSARD

VS.

PEPSI-COLA METROPOLITAN BOTTLING
COMPANY, INC., d/b/a PEPSI COLA
BOTTLING GROUP

CIVIL ACTION NO. 4-84-318-E

ORDER

Now before the Court is Andrew W. Hansard's (Hansard), plaintiff, Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e) to which Pepsi-Cola Metropolitan Bottling Company (Pepsi), defendant, responded. After careful review of the briefs and the applicable law, the Court comes to the following decision.

Plaintiff reasons that since the jury found Pepsi committed a willful violation of the Age Discrimination Act (ADEA) in both the termination and failure to rehire Hansard, plaintiff is entitled to receive an award of double damages pursuant to 29 U.S.C. § 26(b). Plaintiff asserts that once the jury determines the violation under the ADEA is willful the Court lacks discretion to deny an award of liquidated damages under Section 626(b) except on motion for judgment notwithstanding the verdict and requests the Court alter its December 23, 1986 Amended Judgment since defendant did not raise the issue in his motion for judgment notwithstanding the verdict.

Defendant claims that the Court does have discretion in awarding liquidated damages when a willful violation under the ADEA has not been proven and the Court correctly set

aside the liquidated damages as there was no evidence to support the jury's finding that Pepsi acted willfully in knowing or reckless disregard of the law. Defendant further states that the issue is properly before the Court since defendant raised the issue in its motion for directed verdict which the Court reserved ruling upon until judgment was entered.

At the close of plaintiff's case, Pepsi moved for a partial directed verdict on the issue of liquidated damages and again reurged its motion at the close of all the evidence. The Court reserved ruling on the motion at that time and carried the motion along. On December 23, 1986, when entering its Amended Judgment the Court impliedly ruled on defendant's motion for a partial directed verdict on the issue of liquidated damages when the Court specifically stated that "[p]ursuant to 29 U.S.C. § 626(b) the Court has considered the awarding of liquidated damages but under the facts of this case, the Court declines to award liquidated damages." When Pepsi filed its Motion for a Judgment Notwithstanding the Verdict on December 31, 1986, it did not raise the issue of willfullness or liquidated damages since the Court had previously ruled on its motion for partial directed verdict on the issue of liquidated damages by declining to award liquidated damages in its December 23, 1986 Amended Judgment.

In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) the United States Supreme Court addressed the issue of liquidated damages by comparing the provision of the ADEA with the Fair Labor Standards Act (FSLA). The Supreme Court reasoned:

> . . .§ 16(b) for the FSLA, which makes the award of liquidated damages mandatory, is significantly qualified in ADEA § 7(b) by a proviso that a prevailing party is entitled to double damages 'only in cases of wilful violations.'

29 U.S.C. § 626(b).

The Supreme Court's ruling in *Thurston* implies that once it is determined that defendant's violation of the ADEA was

willful the plaintiff is entitled to a mandatory doubling of damages.

The Court of Appeals for the Fifth Circuit has long held, even if a willful violation has occurred, liquidated damages, do not have to be awarded. *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1095 (5th Cir. 1981) (affirming the trial court's reduction of liquidated damages by 50 percent) in an age discrimination case; *Elliot v. Group Medical and Surgical Service*, 714 F.2d 558, 558 n.2 (5th Cir. 1983) (expressly rejecting arguments to change approach on liquidated damages.)

Since *Thurston*, one Fifth Circuit panel has continued to follow *Hayes*. *See Le Compte vs. Chrysler Credit Corp.*, 780 F.2d 1260, 1262,63 (5th Cir. 1986), while another panel has questioned *Hayes*, at least in the context of a finding of retaliation for filing a claim under the ADEA. *See Powell v. Rockwell International Corp.*, 788 F.2d 279, 287 (5th Cir. 1986). In *Powell* the Fifth Circuit reasoned that:

> [even if] the *Hays* rule could have been properly applied in the context of retaliatory discharge, this rule has no vitality after the *Thurston* decision. Prior to *Thurston*, it was possible to find a willful violation, and also find that the employer had acted in 'good faith.' (citation omitted). Because Congress did not intend to impose liquidated damage liability upon employers for good faith violation, the *Hays* rule permitted that court discretion in awarding liquidated damages. Under the *Thurston* rule, however, 'good faith' can no longer coexist with 'willfulness.' The result is that only 'knowing' or 'reckless' violations of the ADEA are subject to liquidated damages. Thus, a further examination of good faith becomes irrelevant because it has already been factored into the *Thurston* 'wilfullness' definition.

Powell 788 F.2d 279, 187 (5th Cir. 1986).

In the instant case the issue of liquidated damages with its attendant requisite act of willfulness was properly before the Court when the Court entered its December 23, 1986 Amended Judgment since the court had carried along

defendant's motion for a directed verdict. Under the *Thurston* and *Powell* standards for awarding liquidated damages, once a willful violation is fonud then the damage amount must be doubled. The District Court has no discretion but to double the amount of liquidated damages when the evidence before the Court supports a finding of willfulness. However, when a motion for directed verdict on the issue of willfulness is before the Court, as it is in this case, it is within the Court's discretion to review the jury's finding of willfulness before making a final determination on the question of liquidated damages.

The Supreme Court in *Thurston* has made clear that liquidated damages are a punitive measure to be reserved only for the most egregious violations of the Act, where the employer either "knows" or "shows reckless disregard" for whether its conduct violates the ADEA. 469 U.S. at 125. In *Thurston*, the Supreme Court emphasized that a stringent standard for imposition of liquidated damages should be maintained because such damages are punitive in nature. *Id.* at 125. As the Court noted, the original bill provided for criminal penalties in cases of willful violations and substituted liquidated damages only to avoid the evidentiary problems arising out of potential employer invocation of the Fifth Amendment. *Id.* Thus, the Court held that the standard for imposing liquidated damages under the ADEA should be equivalent to that used to determine criminal liability under §16(a) of the Fair Labor Standards Act. *Id.* at 126.

The Court further rejected any standard, such as that previously employed in the Fifth Circuit, which would allow a finding of willfulness merely upon a showing that the employer knew the ADEA was "in the picture" and thus potentially applicable to its actions.[1] Such a standard would be inappropriate for awarding punitive damages and, more importantly to the Court, would frustrate the ADEA's two-

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[1] *See, e.g., Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 171), *cert. denied*, 409 U.S. 908 (1972).

tiered liability scheme by making liquidated damages available in almost every case:

> [T]he "in the picture" standard . . . should not govern a provision dealing with liquidated damages. More importantly, the braod standard proposed by respondents would result in an award of double damages in almost every case . . . Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provisions of ADEA § 7(b) in a manner that frustrates this intent.

469 U.S. at 127-28 (footnotes omitted).

The Court finds that Pepsi-Cola's actions cannot be labelled willful in this case. The Supreme Court in *Thurston* set forth the following standard for determining if a violation is willful under the ADEA:

> In general, courts have found that an employer is subject to criminal penalties under the FLSA when he 'wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law.' Nabod Oil Co. v. United States, 190 F.2d 478, 479 (CA10), cert denied, 342 U.S. 876, 96 L.Ed.658, 72 S.Ct. 167 (1951); see also Darby v. United States, 132 F.2d 928 (CA 5 1943). This standard is substantially in accord with the interpretation of 'willful' adopted by the Court of Appeals in interpreting the liquidated damages provisions of the ADEA. The court below stated that a violation of the act was 'willful' if 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' 713 F.2d, at 56. Given the legislative history of the liqudated damages provision, we think the 'reckless disregard' standard is reasonable.

Thurston, at 469 U.S. at 126. Under the *Thurston* standard it would have to be shown that Pepsi-Cola knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. Both the evidence presented by both parties in support and opposition to defendant's motion for summary judgment and the evidence at trial

indicate that there was a question of fact surrounding plaintiff's termination. In fact, both plaintiff and defendant relied upon plaintiff's statement that "I rather not do it if I could get out of it" and Mr. Miller's, of Pepsi-Cola, statement that he [Hansard] just said that he [Hansard] had turned that job down to support their opposing positions. Thus, from the evidence presented the Court found that a motion for summary judgment could not be sustained because there was an issue of fact concerning plaintiff's alleged termination and submitted the termination issue to the jury. The jury found that plaintiff was terminated from his employment with Pepsi-Cola and that age was a determinative factor in such termination. The Court agrees that the evidence presented at trial supports the jury's finding on the issue of termination but disagrees with the jury's finding that the termination was willful. The Court finds that the circumstances surrounding plaintiff's termination does not support a finding that Pepsi-Cola knew or showed reckless disregard for whether its conduct violated the ADEA. Thus, under the *Thurston* standard a willful violation has not been established.

For *Thurston's* two-tier liability scheme to have any meaning, a plaintiff seeking liquidated damages must show egregious circumstances, beyond that necessary to establish liability under the ADEA. Indeed, the U.S. Court of Appeals for the Third Circuit recently held that "in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages, there must be some *additional evidence* of *outrageous conduct." Dreyer v. ARCO Chemical Co.,* 801 F.2d 651, 658 (3rd Cir. 1986). The court held that since "outrageous conduct" is the "essence of punitive damages," this standard should govern an award of liquidated damages whose purpose is wholly punitive under the ADEA. The court relied upon the comments to Section 908(2) of the Restatement (Second) of Torts, quoting the following language:

> [S]ince the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is

> appropriate—which is to say, *conduct involving some element of outrage similar to that usually found in crime.*

Id. at 657-58 (emphasis added). Because the plaintiff in *Dryer* failed to established outrageous conduct, the Court reversed the trial court's denial of the employer's j.n.o.v. motion with respect to liquidated damages. *See also Smith v. Consolidated Mutual Water Co.*, 788 F.2d 1441, 1443 (10th Cir. 1986) (*Thurston* precludes award of liquidated damages where there was no evidence beyong the circumstantal evidence to support the finding of liability); *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 157-58 (7th Cir. 1981)[2] (liquidated damages not allowable absent direct or "compelling" evidence of a conscious intent to discriminate); *Spanier v. Morrisson's Management Services*, 611 F.Supp. 642, 647 (N.D. Ala. 1985) (under *Thurston*, "liquidated damages are not recoverable except when some aggravated circumstances, in addition to basic evidence of intentional discrimination, are present").[3] Accordingly, the Court finds that there is no basis for the jury's finding of willful discrimination in Hansard's loss of employment.

Similarly, the circumstances surrounding the decision not to rehire Hansard cannot support a finding of willfulness. The evidence established that Garcia had eliminated Hansard's name from consideration for the Checker position based upon his understanding of the Company's no-hire policy and without any knowledge of Hansard's age. Such an action by Pepsi-Cola does not rise to the *Thurston* standard for willfulness, that is, defendant knew or showed reckless disregard for whether the action was in violation of

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[2] *Syvock*, a pre-*Thurston* case, applies a "should have known" standard which is less stringent than that subsequently adopted by the Supreme Court in *Thurston*.

[3] Under this heightened standard, a consideration of employer "good faith" is no longer necessary, since the more stringent showing of willfulness now required under *Thurston* necessarily obligates the plaintiff to establish the absence of good faith as a prerequisite of liquidated damages. *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, 285 (5th Cir. 1986).

the ADEA. Pepsi's conduct would thus not even satisfy the pre-Thurston standard for willfulness—knowing that the plaintiff was in the protected age group and that the ADEA was "in the picture." Since *Thurston* rejected the "in the picture" standard as far too lenient, it is obvious that no finding of willfulness can be made here.

Thurston and the other cases discussed above establish that liquidated damages are not intended to provide an automatic windfall to every plaintiff able to convince a jury that age may have been one of the determining factors in an employer's decision. Rather the criminal origins and punitive purpose of the ADEA's liquidated damage provision mandate that awards of such damages be limited to the most offensive and blatant instances of age discrimination. In this case the Court concludes that Pepsi's conduct toward Hansard cannot warrant the imposition of the harsh, quasi-criminal penalty of liquidated damages.

Accordingly, the Court hereby DENIES plaintiff's motion to alter or amend judgment and hereby finds that defendant's actions were not willful as to either the termination or the failure to rehire the plaintiff despite the jury's finding to the contrary.

Signed this 20th day of August, 1987.

/s/ ELDON B. MAHON

Eldon B. Mahon
United States District Judge

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ANDREW W. HANSARD

VS.

PEPSI-COLA METROPOLITAN BOTTLING
COMPANY, ET AL
CIVIL ACTION NO. CA 4-84-318

July 29,1986 Commencing at 9:05 a.m.

VOLUME III
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. ELDON B. MAHON, with a jury

Direct Examination of Mr. Charles Miller:

Q. Who gave you those instructions, and what do you remember about them?

A. To the best of my recollection, it was Rob Dick who said that he would not be available to the warehouse anymore.

Q. And did he give a reason or indication?

A. No, sir.

Q. At some point after that time, Andy was terminated from Pepsi, was he not?

A. Yes, sir.

Q. Do you recall how soon after he quit working in the warehouse? Was it a matter of a few days or a week?

A. I think it was just a few days.

Q. Do you, yourself, have any knowledge of Mr. Hansard's termination, in other words, any meeting that took place?

A. No, sir. I was not included in any meeting.

Q. Did you have a conversation with Mr. Hansard sometime shortly after he was terminated?

A. Yes, sir, I did.

Q. Do you recall—or did you express to him at that time any thoughts that you had about his termination, the reason for it and so forth?

A. I don't know about the thoughts. I did tell him I was sorry to see him go. I thought he got a raw deal.

MR. GECKER: Your Honor, I object to that.

THE COURT: Let me ask you. Did you tell him that, that you thought he got a raw deal?

THE WITNESS: Yes, sir.

MR. GECKER: His subjective opinion is irrelevant, Your Honor. There is no foundation. He said he had no knowledge of the circumstances.

THE COURT: I overrule the objection. You can testify to anything that you said, but you can't testify to what Mr. Hansard said. You can't testify to anything he said unless some of the Pepsi-Cola management was present, but you can testify to anything you said or anything you said with the Pepsi-Cola management people about it but not what Mr. Hansard said to you.

THE WITNESS: Yes, sir.

THE COURT: That would be hearsay.

Q. (By Mr. Casey) Why did you think Mr. Hansard got a raw deal?

A. Well, I thought he was a good employee. In fact, I wanted him in the warehouse working for me again.

Q. Full-time?

A. Yes. There was a full-time opening.

Q. Was that in the repack or the—are you talking about later on?

A. Later on.

Q. What was your thoughts as to the reason he was terminated at Pepsi?

MR. GECKER: I object, Your Honor.

THE COURT: I sustain the objection on thought. He can testify to what he knows.

Q. (By Mr. Casey) Did you know what the reason was that Mr. Hansard was terminated?

MR. GECKER: That's been asked and answered, Your Honor.

A. Did I know? No, sir.

Q. (By Mr. Casey) Did you hear any statements from Rob Dick or Michael Miller, Mark Esselman, Scott Barth, or anyone, about why Mr. Hansard was terminated?

A. No, sir.

Q. Do you have an opinion as to the reason for his termination?

A. Yes, sir.

MR. GECKER: I object, Your Honor.

THE COURT: I'm going to sustain the objection.

MR. CASEY: Your Honor, he was the employee at the time all this was going on. I think his opinion would be very relevant.

THE COURT: Well, he has got to find out what his opinion was based on, the basis for the opinion. Then we can move to the weight of the testimony.

Q. (By Mr. Casey) Okay. You stated that you had an opinion for the reason for Mr. Hansard's termination. What did you base that opinion on?

A. Just my own thoughts.

Q. Was there anything else, things that were going on around there at that time, or anything that led you to that opinion? When you say your own thoughts, I guess that's not quite the question—

A. I can state something that was going on, yes. There was a youth movement going on.

MR. GECKER: I'm going to object to that. It's unresponsive, incomprehensible, irrelevant.

THE COURT: I overrule the objection.

Q. (By Mr. Casey) What do you mean by that, Mr. Miller?

A. There were a bunch of what they call CREW people being brought in.

Q. What is CREW?

A. I don't know. I don't know what it means or what it stands for, college graduates or fixing to be college graduates that were interviewed by Pepsi-Cola to come in brand new. You didn't have to have any knowledge. In fact, one of them majored in music.

Q. Based on that, you feel there was a youth movement going on?

A. Yes, sir, I do.

Q. Was there anything else then that you felt was part of this youth movement or an indication of it?

A. No, sir. You mentioned a minute ago that you wanted to put Mr. Hansard on under you in the warehouse at a later period of time; is that correct?

A That is correct, sir.

Q. Tell us, if you would, approximately when that was and what the circumstances of that were.

A. It was right after Rob Dick left as the general service manager and they hired Phil Garcia.

Q. About when was that, either in terms of a calendar or in terms of when Mr. Hansard was terminated out there?

A. That was after Andy was terminated.

Q. Do you recall how long after?

A. Maybe two or three months.

Q. What happened around that time when Mr. Garcia replaced Mr. Rob Dick?

A. Mr. Garcia told me I had—I'm trying to find the right word. They were cutting down on hours. I had let the forklift driver go, one of the lowest on the seniority list. I let him go subject to recall, and I also needed another checker. So I went out and I got the forklift driver back immediately by the instructions of Mr. Garcia.

Q. You mean you rehired someone who had been laid off earlier?

A. Yes, sir, I did.

Q. What about a checker?

A. I needed a checker. I immediately thought of Mr. Hansard.

Q. What made you think of Mr. Hansard for that position?

A. Like I say, I knew him for fifteen years. I knew that he was out of a job. I needed somebody that would be easy for me to hire, somebody I knew and trusted, than to break in a new man.

Q. Were there any characteristics of Mr. Hansard that you thought would suit him to the checker job?

A. Yes, sir. As far as I knew, he was honest. The main thing to me was that he was dependable, and that's what I needed.

Q. Were there any particular requirements for the job of checker that Mr. Hansard did not have?

A. No, sir, not that I know of.

Q. Was it in a category with jobs that for any reason Mr. Hansard would not have been eligible for him seeking with respect to like salary or hourly or exempt? Was there any reason that Mr. Hansard would not qualify for the checker job?

A. Not that I know of, sir.

Q. What did you do when Mr. Garcia—did Mr. Garcia authorize you to get a checker?

A. Yes. He told me to get a checker.

Q. What did you do?

A. I called Mr. Hansard, and I interviewed him.

Q. You phoned him?

A. Yes. I phoned him and set up an appointment, right.

Q. What did you tell Mr. Hansard, do you recall, about the situation?

A. I told him I would like to interview him. I thought maybe I had an opening for him.

Q. Was he interviewed?

A. Yes, he was, sir.

Q. And did he come to the Pepsi plant?

A. He did, sir.

Q. Again, you're talking about some time around two or three months after he was fired?

A. Yes, sir.

Q. Would it have been late summer of '83?

A. Yes, sir.

Q. What did you do after meeting with Mr. Hansard?

A. I told Mr. Garcia that I thought I had a checker, and to the best of my knowledge, he said check with Mesquite.

Q. Did you tell him who you had selected and so forth?

A. Yes, sir, I did.

Q. Did you mention to him that was a former employee?

A. No, sir, I did not.

Q. What happened next in relation to this situation?

A. You mean later on, the next couple of days?

Q. Yes, the next time you heard from anybody about hiring—

A. The next couple of days I found out that I could not hire Mr. Hansard.

Q. How did you find that out, Mr. Miller?

A. Mr. Garcia told me.

Q. Did he give you a reason?

A. To the best of my recollection, he said Mesquite turned it down.

Q. Did he mention the name of anyone in Mesquite that turned it down?

A. No, Sir.

Q. Who was Mr. Garcia's boss?

A. Mr. John Bain.

Q. Was he located in Mesquite?

A. He was, sir.

Q. And had he been with Pepsi for some time at that time?

A. He had—oh, John Bain was also a regional sales manager in there, too, between Rob Dick and Garcia.

Q. So John Bain had been at the Fort Worth—

A. John Bain, yes. It was Michael Murray, John Bain, Rob Dick, and Phil Garcia. John Bain did have the Fort Worth plant for awhile.

Q. So in any case, Mr. Bain was working for Pepsi-Cola at the time Andy Hansard was fired?

A. He was, sir.

Q. Do you have an opinion on why Mr. Hansard was not hired or rehired for the checker job?

MR. GECKER: Objection, Your Honor.

THE COURT: Well, he can "yes" or "no."

A. Do I have an opinion?

Q. (By Mr. Casey) yes, sir.

THE COURT: You can answer "yes" or "no."

A. Yes, sir.

Q. (By Mr. Casey) All right. What is that opinion?

MR. GECKER: Objection, Your Honor. There is no basis.

THE COURT: You have to have a basis.

Q. (By Mr. Casey) Once again, what do you base your opinion on?

A. My own personal thoughts.

Q. Okay. What do you base those thoughts on? Was it something anyone said or the things that were going on, or what?

A. Basically, things that were going on, yes, sir.

Q. And that being?

A. That being the youth movement.

Q. What is your opinion, then, as to why Mr. Hansard was not hired?

MR. GECKER: Your Honor, we object. The fact that the company's hire policy is insufficient for him to form a basis as to what happened in this case. He stated he had no independent knowledge. He was never told what—

THE COURT: I'll overrule the objection. He can answer what he did. This just goes to the weight of the testimony. If he's got sufficient information to base an opinion on, that is for you to decide.

Q. (By Mr. Casey) What is your opinion as to why Mr. Hansard was not hired for the checker position?

A. My opinion is I felt that they thought he was too old.

Q. Okay. Let me ask you this, Mr. Miller. Is there anything else that you can think of that would cause this? In other words, this youth movement, you mentioned the college graduates. What else was it, if anything, that led you to believe a youth movement was going on?

A. This is my own opinion again. I have seen people there as district managers that were let go to get someone in there with way less experience—

MR. GECKER: Your Honor, may we approach the bench please?

THE COURT: All right.

(The following conference held at the bench out of the hearing of the jury)

MR. GECKER: Your Honor, we're in the are of the motion in limine that we did before trial—you have already gotten into it, Terry.

THE COURT: What do you mean?

MR. GECKER: We brought a motion in limine to exclude any testimony regardng termination of other employees which are irrelevant to this lawsuit.

THE COURT: What other employees are you talking about terminating?

MR. CASEY: I'm not going to follow up on that. I asked in terms of asking specific people, and I do want to get